

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 25, 2004

IN RE:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH	)	
COMMUNICATIONS CORP, NUVOX COMMUNICATIONS, INC.,	)	
KMC TELECOM V, INC., KMC TELECOM III LLC, AND	)	DOCKET NO.
XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS	)	04-00046
OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO.,	)	
SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT	)	
CO. OF CHATTANOOGA, LLC OF AN INTERCONNECTION	)	
AGREEMENT WITH BELL SOUTH TELECOMMUNICATIONS,	)	
INC.	)	

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ORDER DENYING MOTION IN PART AND  
ESTABLISHING PROCEDURAL SCHEDULE

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This matter is before the Pre-Arbitration Officer pursuant to the *Motion to Sever or to Impose Procedural Restrictions* ("Motion") filed with the Tennessee Regulatory Authority ("TRA") by BellSouth Telecommunications, Inc. ("BellSouth") on February 25, 2004. For the reasons specified below, this *Motion* is denied in part.

**BACKGROUND**

On February 11, 2004, a *Joint Petition for Arbitration* ("Joint Petition") with BellSouth was filed by NewSouth Communications, Corp. ("NewSouth"), NuVox Communications, Inc. ("NuVox"), KMC Telecom V, Inc., KMC Telecom III LLC (together "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Chattanooga, LLC (together "Xspedius"), ultimately resulting in four separate interconnection agreements. The Petitioners

assert that this *Joint Petition* is appropriate since informal negotiations have been conducted collectively with BellSouth and most remaining issues are common to each Petitioner.

BellSouth filed its *Motion* in response to the *Joint Petition*, alleging that Section 252 of the Telecommunications Act<sup>1</sup> does not contemplate arbitration between BellSouth, as the incumbent local exchange carrier, and more than one competitive local exchange carrier ("CLEC"), even though the act does not expressly prohibit such an arbitration. BellSouth, essentially, contends that an arbitration with multiple CLECs would only be appropriate if separate petitions for arbitration were filed and, thereafter, consolidated into one proceeding by the TRA. Because the Petitioners did not file separate petitions for arbitration or, in the opinion of BellSouth, provide sufficient grounds under state law to support a consolidated proceeding, BellSouth requests that the arbitration for each CLEC represented in this Docket be severed into a separate proceeding.

In the alternative, BellSouth seeks certain procedural safeguards to ensure the efficiency and economy of a joint arbitration. Specifically, BellSouth requests that the Petitioners be required to proceed in this arbitration as if one party. To this end, BellSouth suggests that, for each issue or sub-issue, Petitioners should be limited to one unified position, one witness, and one cross-examination.

In response to BellSouth's *Motion*, the Petitioners contend that BellSouth's objections do nothing more than exalt form over substance.<sup>2</sup> Petitioners maintain that, while not standard operating procedure, an arbitration with more than two parties is not inconsistent with federal law and that, in this Docket, such an arbitration will, indeed, produce efficiencies by necessitating only one proceeding rather than four separate proceedings. Petitioners object to the

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<sup>1</sup> 47 U.S.C. § 252

<sup>2</sup> See *Joint Response of Petitioners to BellSouth's Motion to Sever or to Impose Procedural Restrictions*, p. 2-3 (March 2, 2004)

notion of participating in this arbitration as if only one entity but have agreed to some of BellSouth's suggestions to streamline the process: a consolidated CLEC position with consolidated testimony for each issue and a consolidated cross-examination of BellSouth witnesses. Also in the interest of efficiency, Petitioners have offered a panel of witnesses, or some other such team approach, for BellSouth's cross-examination of CLEC witnesses.

A Status Conference was held on May 12, 2004 to address this matter and any compromise that may have been reached between the Parties. At this time, BellSouth reiterated its concern with the panel approach to cross-examination and being required to cross-examine multiple CLEC witnesses on each outstanding issue. To alleviate this concern, BellSouth suggested that the Petitioners identify a single witness to present testimony on a joint policy position for each issue/sub-issue and that additional witnesses be presented only as necessary to provide CLEC-specific factual information. The Petitioners maintained their right to put evidence into the record, especially company-specific information, and claim that, notwithstanding the manner in which the hearing is conducted, sufficient efficiencies will be gained from a joint proceeding through one set of discovery requests, one set of briefs, and one set of motions. Petitioners also assert that, in other jurisdictions, joint testimony has included a list of all sponsoring witnesses for each issue, consistent with BellSouth's recommendation, in order to fully represent the interests of each CLEC and to avoid objections based on hearsay.

### **FINDINGS AND CONCLUSIONS**

BellSouth is, essentially, contending that, in filing the *Joint Petition*, the Petitioners have failed to comply with the criteria for consolidation of what otherwise would have been four separate petitions for arbitration. BellSouth is now asking that the proceedings be severed according to this same criteria.

Tenn. Comp. R. and Regs. 1220-1-2-.22(2) allows for the consolidation of dockets in the interest of “just, efficient and economical disposition of cases.” So long as these goals are furthered in this Docket, a consolidated arbitration is appropriate.

To this end, the Petitioners assert a common position on the vast majority of outstanding issues<sup>3</sup> and have agreed to one consolidated cross-examination of BellSouth witnesses. Thus, the only dispute that remains between the Parties is the method by which the Petitioners will answer interrogatories, submit pre-filed testimony, and present witnesses for cross-examination by BellSouth. However, notwithstanding the lack of agreement on these matters, there are still sufficient efficiencies to be gained from a consolidated proceeding, as indicated by Petitioners and, therefore, it is on this basis that BellSouth’s motion to sever is denied.

Accordingly, this Docket will proceed as one consolidated arbitration. In order that the hoped for efficiencies will, indeed, be realized, and that the Parties are guaranteed a full and fair opportunity to be heard, the following additional safeguards shall be adopted for the presentation of testimony by the Petitioners and the cross-examination of CLEC witnesses by BellSouth: each issue/sub-issue shall be addressed by the Petitioners in interrogatories and pre-filed testimony and at the hearing with one unified policy position, with allowance for additional CLEC-specific information as necessary. When answering interrogatories and preparing pre-filed testimony, the Petitioners shall specify the sponsoring witness(es) and shall, for purposes of the hearing, designate a lead witness to represent their unified policy position on each issue. All pre-filed testimony shall identify the issue to which the testimony applies. At the hearing, BellSouth will have the option to cross-examine the lead witness or any other witness(es) offered during discovery or in pre-filed testimony to provide CLEC-specific information.

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<sup>3</sup> Petitioners maintain that all CLECs share a common position on all outstanding issues but that a handful of issues are being raised by fewer than all four CLECs. See *Transcript of Status Conference*, p. 5 (May 12, 2004)

## **PROCEDURAL SCHEDULE**

Also addressed at the Status Conference were the joint Issues Matrix and the Procedural Schedule for the remainder of the proceedings in this Docket. Following review of the joint Issues Matrix<sup>4</sup> filed by the Petitioners on April 1, 2004, the Parties agreed to file an updated joint Issues Matrix on May 19, 2004, along with a proposed procedural schedule and a document waiving the nine-month statutory deadline for resolution of the arbitration by the TRA.<sup>5</sup> All of these documents were filed with the TRA on May 19, 2004 as ordered<sup>6</sup> and, as proposed, the Procedural Schedule is established as follows:

<b>June 1, 2004</b>	The Parties shall file with the TRA a joint Issues Matrix representing the consensus of the Parties on all issues
<b>June 25, 2004</b>	Pre-filed Direct Testimony shall be filed with the TRA and served on all Parties
<b>July 16, 2004</b>	Pre-filed Rebuttal Testimony shall be filed with the TRA and served on all Parties
<b>July 21, 2004</b>	Discovery Requests shall be filed with the TRA and served on all Parties
<b>August 4, 2004</b>	Responses and Objections to Discovery Requests shall be filed with the TRA and served on all Parties
<b>August 11, 2004</b>	Motions to Compel Responses to Discovery Requests shall be filed with the TRA and served on all Parties
<b>August 17, 2004</b>	Responses to Motions to Compel Responses to Discovery Requests shall be filed with the TRA and served on all Parties
<b>August 31 – September 3, 2004</b>	Hearing before the Arbitration Panel

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<sup>4</sup> At the Status Conference, BellSouth stipulated that the filing of the Petitioners does represent a joint Issues Matrix. See *Transcript of Status Conference*, p. 5 (May 12, 2004).

<sup>5</sup> 47 U.S.C. § 252(b)(4)(C).

<sup>6</sup> The Parties did file an Issues Matrix but have, apparently, not yet completely agreed on the wording of all issues.

**IT IS THEREFORE ORDERED THAT:**

1. BellSouth's request to sever this Docket into four separate arbitrations is denied.
2. The Petitioners shall advance a unified policy position on each outstanding issue/sub-issue as indicated in the joint Issues Matrix.
3. In furtherance of the unified policy position, Petitioners may present CLEC-specific factual information as necessary.
4. The presentation of testimony by Petitioners and the cross-examination of CLEC witnesses by BellSouth shall be done in accordance with the guidelines established above.
5. The Petitioners shall engage in a unified cross-examination of BellSouth witnesses.
6. The Procedural Schedule for the remainder of the proceedings in this Docket is established as indicated above.



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Kim Beals, Counsel  
as Pre-Arbitration Officer